**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **TERESA J. PRATHER** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 211,559 |
| **AUTOMOTIVE CONTROLS CORPORATION** | ) | |
| Respondent | ) | |
| Self-Insured | ) | |

## ORDER

Claimant requested Appeals Board review of Jon L. Frobish's November 25, 1998, Award. The Appeals Board heard oral argument on July 7, 1999.

### APPEARANCES

The claimant appeared by her attorney, Timothy A. Short of Pittsburg, Kansas. The respondent, a qualified self-insured, appeared by its attorney, Garry W. Lassman of Pittsburg, Kansas.

### RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

### ISSUES

The Administrative Law Judge found claimant sustained an overuse injury to her bilateral upper extremities while employed by the respondent. He found an accident date of May 20, 1996; a $455.40 average weekly wage; and based on a 7 percent permanent functional impairment rating, awarded claimant a 7 percent permanent partial general disability.

On appeal, claimant contends the record proves a June 28, 1997, accident date; a $512.07 average weekly wage; and a work disability of 30 percent based on a work task loss of 28 percent and a wage loss of 32 percent.

In contrast, the respondent contends claimant's date of accident is January 1996 and therefore, as held in Boucher v. Peerless Products, Inc. 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996), she is entitled only to her medical expenses because she did not miss any work as a result of her work-related injury.[1] If the Appeals Board finds claimant is entitled to a permanent partial general disability award, respondent then contends claimant is not entitled to a work disability because she voluntarily removed herself from her regular job that she had the ability to perform within her permanent work restrictions.

In summary, the issues for Appeals Board review on appeal are: (1) What is claimant's date of accident; (2) What is claimant's pre-injury average weekly wage; (3) What is claimant's post-injury average weekly wage; (4) Was claimant disabled for at least one week from earning full wages; and (5) If claimant is entitled to a permanent partial disability award, is she limited to her functional impairment or is she entitled to a work disability?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

## FINDINGS OF FACT

(1) Claimant started working for the respondent on June 5, 1989, as an assembler on the production line.

(2) On the date of the regular hearing, August 12, 1998, claimant remained an employee of the respondent, working in an office job as a customer service representative.

(3) Claimant seeks permanent partial general disability benefits for permanent injuries she claims she sustained to her upper extremities caused by her regular work activities over the period of time commencing the summer of 1995 through June 28, 1997.

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[1] *See* K.S.A. 44-501(c).

(4) Before that period of injury, claimant's work as an assembler required her to perform repetitive gripping activities with both of her hands.

(5) Claimant's hands and wrists became symptomatic in 1991. She reported those symptoms to the respondent, and respondent provided claimant with medical treatment through Fred Wood, M.D.

(6) On October 29, 1991, Dr. Wood performed bilateral endoscopic surgical releases of claimant's carpal tunnels. Additionally, on August 25, 1992, Dr. Wood performed a surgical release of claimant's left first dorsal wrist compartment and decompression of the sensory branch of the radial nerve.

(7) Dr. Wood released claimant to return to her regular work on September 23, 1992. Dr. Wood did not impose any permanent restrictions on claimant and did not express an opinion on claimant's permanent functional impairment.

(8) On September 12, 1994, claimant transferred to a material handling job in the thick-film department. The thick-film department is responsible for manufacturing electronic ceramic circuit boards. This job required claimant to lift trays, stock department with parts, assist set-up people in preparing machines to operate, report and record test results from inspecting parts. Claimant was required to do a lot of lifting parts by forceful gripping with her hands, removing lids from paste jars, opening boxes, and removing items needed for the manufacturing process.

(9) Claimant's wrists and hands again became symptomatic in the summer of 1995. She was first seen by the company nurse on August 28, 1995, with complaints of numbness in her left thumb and left index finger.

(10) On January 17, 1996, claimant returned to the company nurse with pain in both hands and into her left forearm. The company nurse referred claimant to the company physician, Dr. Mears. Dr. Mears saw claimant on January 22, 1996, diagnosed tendonitis, and prescribed Lodine, an anti-inflammatory medication.

(11) Claimant returned to the company nurse on February 23, 1996, with left hand pain and cramping. Claimant was again referred to the company physician, Dr. Mears.

(12) Dr. Mears saw claimant on February 26, 1996. The doctor diagnosed tendonitis and advised claimant that she "should avoid opening jars, etc.". The doctor also prescribed physical therapy, work hardening, and a brace plus ordered claimant to undergo EMG nerve testing. The nerve testing was completed on February 27, 1996, and was negative.

(13) Claimant also testified that Dr. Mears placed her on light duty for two weeks. The light duty consisted of her inspecting parts under a microscope. This light duty job did not cause claimant any additional problems.

(14) Claimant was then returned to her regular job as a material handler. She testified the pain and discomfort in her hands and wrists worsened as she continued to perform the material handler job duties.

(15) Furthermore, as claimant continued to work and as the pain and discomfort in her hands worsened, she was told by her supervisor no light duty jobs in production were available. Therefore, although the job paid less money, claimant bid on a physically less demanding office job in the customer service department.

Claimant was awarded the bid and transferred to the customer service job on June 30, 1997. The customer service office job duties consisted of answering the telephone, filing, and keying information into a computer. Claimant has had some flare-ups of pain and discomfort in her wrists while performing the office job. But overall the job is much easier on her hands and wrists and she has demonstrated she is capable of preforming the job duties.

(16) The Administrative Law Judge found the only evidence in the record as to claimant's pre-injury average weekly wage was claimant's testimony. Therefore, the Administrative Law Judge found claimant's pre-injury average weekly wage equaled $455.40 based on a 44 hour work week times an hourly rate of $10.35.

(17) At the deposition of the respondent's safety and loss control supervisor, Barbara Long, claimant's weekly earning records were admitted into evidence that showed claimant's weekly earnings from the week ending July 29, 1995, through the week ending September 30, 1998.

(18) Claimant argues her date of accident is June 28, 1997, the last day she worked on the material handling job before she was transferred to the office job. Claimant argues her pre-injury average weekly wage equals $512.70 based on a straight time work week of 40 hours times $10.35 per hour or $414.00 plus the average weekly overtime earned in 24 weeks preceding the June 28, 1997, accident date of $98.70 per week.

(19) The only physician to testify in this case was orthopedic surgeon William D. Smith, M.D., of Bartlesville, Oklahoma. At the request of claimant's attorney, Dr. Smith examined and evaluated claimant once on May 20, 1996. Before the examination, Dr. Smith was supplied with Dr. Fred Wood's medical treatment records. He testified he reviewed those records before the examination.

After taking a history from the claimant and performing a physical examination of claimant, Dr. Smith diagnosed claimant with status post-bilateral carpal tunnel releases and status post-surgical release of the first dorsal wrist compartment and radial sensory nerve on the left. He further opined that claimant had overuse syndrome (extensor tendonitis) involving both wrists secondary to recent work activities before January 1996. The doctor completed a functional capacity evaluation form, supplied by claimant's attorney, that contained permanent work restrictions he recommended claimant to follow. Those restrictions are summarized as follows: (1) sit and stand 7 hours out of an 8 hour day; (2) drive 2 hours out of an 8 hour day; (3) continuously lift and carry 1 to 10 pounds; (4) frequently lift and carry 10 to 20 pounds; (5) occasionally lift and carry 20 to 50 pounds; (6) never lift and carry over 50 pounds; (7) occasionally push/pull, climb, balance, kneel, grasp objects, and manipulate objects; (8) frequently bend; (9) never crouch or crawl; (10) no restriction on repetitive hand or feet movements; (11) no working in unprotected heights or with moving machinery.

(20) Dr. Smith also expressed an opinion on claimant's permanent impairment of function and opined, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, that he would assign a 5 percent permanent impairment to the claimant's right upper extremity and a 7 percent permanent impairment to her left upper extremity. The doctor converted the two extremity ratings to a 7 percent permanent functional impairment of the body as a whole.

(21) Dr. Smith was shown a list of claimant's job tasks that had been compiled by vocational expert Karen Crist Terrill on January 9, 1998. Ms. Terrill interviewed the claimant on January 6, 1998, in regard to the job tasks claimant had performed in 15 years before June of 1997. At the regular hearing, claimant identified the job tasks list and verified its accuracy.

Dr. Smith, on direct examination, agreed with Ms. Terrill's conclusion, that utilizing Dr. Smith's permanent restrictions claimant could no longer perform 12 of the total of 43 job tasks she performed before June 1997. This computed to a 28 percent loss of job task performing ability. But on cross examination, Dr. Smith agreed that claimant retained the ability to perform the job task of using the microscope to inspect parts. Accordingly, claimant's loss of job task performing ability would be 11 out of the 43 for a 26 percent loss.

(22) The material handling job that claimant performed until she bid and was transferred to the office job contained the job task described as "Constantly handled materials, lifted 25-30 pound sacks of trays, and gripped both sides of tray. Would also use a cart at times to move materials". This job task was performed by the claimant 86 percent of the work day.

(23) As previously noted above, claimant identified Ms. Terrill's job task list as an accurate description of the job tasks she had performed in the past 15 years. But, Linda Matthews, claimant's supervisor, during the time claimant worked as a material handler, testified and denied that claimant, at any time, was required to lift over 10 pounds as a material handler. Ms. Matthews also had not been informed by the respondent that claimant had permanent restrictions placed on her by Dr. Smith on May 20, 1996. Further, Ms. Matthews testified claimant had not complained to her that the material handling job caused pain and discomfort in her hands and wrists.

(24) The claimant argues her post-injury average weekly wage while employed as a customer service representative is $347.60. Claimant computes this weekly wage by taking the starting $8.69 hourly rate times 40 hours per week. Without explanation, claimant does not add the average weekly overtime she was paid to the straight time weekly rate.

(25) The Appeals Board finds claimant's post-injury average weekly wage is $431.99. This is computed by taking $9.13 per hour, the hourly rate claimant was earning on September 30, 1998, times 40 hours per week or $365.20. Then added to the straight time weekly wage is the average weekly overtime amount of $66.79 per week claimant earned in 26 weeks preceding September 30, 1998.[2]

## CONCLUSIONS OF LAW

(1) Claimant has the burden to prove by the preponderance of the credible evidence her right to an award of compensation and to further prove the various conditions on which that right depends.[3]

(2) The appropriate accident date in a case where an injured worker transfers to another job because of the worker's repetitive use or a micro-trauma injury is the last day the claimant worked on the job causing her injury.[4]

(3) Dr. Smith opined that claimant permanently aggravated a preexisting bilateral upper extremity condition by overuse work activities commencing in 1995. Based on his

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[2]The Appeals Board acknowledges that claimant's post-injury average weekly wage increased due to the hourly rate increase from June 30, 1997, of $8.69 per hour to September 30, 1998, of $9.13 per hour. But that increase does not effect the number of weeks of permanent partial disability paid or the weekly compensation rate paid for that period of disability.

[3]*See* K.S.A. 1996 Supp. 44-501(a) and K.S.A. 1996 Supp. 44-508(g).

[4]Treaster v. Dillon Companies, Inc., Docket No. 80,830 (Kan. 1999).

interpretation of the history given to him by the claimant, he was of the opinion claimant's work activities had caused permanent aggravation to claimant's upper extremities before January 1996. But the Appeals Board finds, after claimant was examined by Dr. Smith on May 20, 1996, and restrictions were imposed, she continued to perform the material handling job. Claimant established through her testimony that the pain and discomfort in her upper extremities worsened. Also, claimant testified respondent would not accommodate her in a lighter production job. Therefore, because of her worsening condition, claimant's successfully bid and was transferred to an office job on June 30, 1997. The Appeals Board, therefore, concludes that claimant's appropriate accident date is June 28, 1997, the last day she worked the job that continued to cause her injury.

(4) Having found a June 28, 1997, accident date, the Appeals Board concludes claimant's workers compensation benefits are not limited to medical expenses even if she did not miss work as a result of her work-related injuries. [5]

(5) K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

(6) But K.S.A. 1996 Supp. 44-510e(a) limits a claimant to functional impairment so long as claimant earns a wage equal to 90 percent or more of the pre-injury average weekly wage.

(7) Dr. Smith was the only physician to testify and express an opinion on claimant's permanent functional impairment. Dr. Smith's 7 percent permanent functional impairment of the body as a whole is adopted by the Appeals Board.

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[5] On April 4, 1996, the legislature deleted that language from the statute. Therefore, for work-related accidents after April 4, 1996, if claimant does not miss work, he or she is not limited to compensation for only medical expenses.

(8) An injured worker is not limited to functional impairment where the worker attempts to perform employment but can not because of continuing pain and discomfort he or she experiences as a result of the work related injuries.[6]

(9) Claimant established through her testimony that the pain and discomfort in her hand and wrists worsened as she continued to perform her regular job duties as a material handler. Because of the pain and discomfort, she voluntarily bid and was transferred into a less physical office job.

(10) The Appeals Board finds that claimant's pre-injury average weekly wage is $508.03[7] and her post-injury average weekly wage is $431.99. When these two average weekly wages are compared there is a 15 percent wage loss. Accordingly, the Appeals Board finds claimant is entitled to a work disability because her post-injury wage is not 90 percent or more than her pre-injury average weekly wage.[8]

(11) Dr. Smith was the only physician to express an opinion on claimant's loss of work tasks. The Appeals Board adopts Dr. Smith's opinion that claimant no longer can perform 11 of the 43 work tasks she could preform before injury for a 26 percent work task loss.

(12) As required by the statute, claimant's 26 percent work task loss is averaged with her 15 percent wage loss entitling claimant to a 20.5 percent work disability award.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's November 25, 1998, Award should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Teresa J. Prather, and against respondent, Automotive Controls Corporation, a qualified

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[6]*See* Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[7]Claimant only utilized 24 weeks that claimant worked before June 28, 1997, to find an average weekly overtime rate of $98.70 per week. But K.S.A. 44-511(b)(4)(B) requires an injured worker's average weekly overtime rate to be computed based on a 26 week period next preceding the date of accident instead of the 24 week period used by claimant. Utilizing the 26 weeks before June 28, 1997, claimant had average weekly overtime rate of $94.03 for a $508.03 pre-injury average weekly wage.

[8]K.S.A. 1996 Supp. 44-510e(a)

self-insured, for an accidental injury sustained on June 28, 1997, and based upon an average weekly wage of $508.03.

Claimant is entitled to 85.08 weeks of permanent partial disability compensation at the rate of $338 per week for a 20.5% permanent partial general disability, making a total award of $28,757.04 which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

All remaining orders contained in the Award are adopted by the Appeals Board that are not inconsistent with this Order.

**IT IS SO ORDERED.**

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director